IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 541 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GANDHI BHAVESH MANEKLAL PROP.OF SHRI SIDDI HARDWARE - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR DN PANDYA for the Applicant.
Ms. K.C.Shah, Addl. PUBLIC PROSECUTOR for Respondent no.1.
MR ADIL MEHTA for Respondent no.2.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 25/08/2006

ORAL JUDGMENT

The present Revision Application has been preferred by the original complainant against the order dated 20th September, 2001 below application exh. 13 in criminal case no.842 of 2000 passed by the learned Judicial Magistrate, First Class, Rajpipla whereby the application preferred by the respondent no.2 (original accused) for discharge was allowed without recording any evidence and just by referring reply of the show cause notice which was given under section 138 of the Negotiable Instruments Act, 1881.

2. I have heard the learned advocate for the applicant who has submitted that no evidence was ever recorded. Only on the basis of the reply of the show cause notice given by respondent no.2-accused under section 138 of the Negotiable Instruments Act, the accused has been discharged. The reply is not a gospel truth. Bare assertion is quite far away from truth and therefore, evidence ought to have been taken and in absence of any evidence, such a conclusion ought not to have been arrived at by the trial court. Bare defence cannot be the basis of exoneration from the charges. It is misfortune of the

present applicant that the trial court has not understood such an admitted position of law. Even otherwise also, the cheque which was given on 1st December, 1999 for Rs. 60,850/- was dishonoured on 2nd February, 2000. Therefore, show cause notice was given on 4th February, 2000. No payment was made and therefore, the complaint was filed on 28th February, 2000. The defence has been raised that there was no consideration moved from the original complainant. Without taking any evidence, such a a presumption under section 118 of the Negotiable Instuments Act, 1881 could not have been rebutted. This aspect of the matter has not been appreciated by the trial court. There is a statutory presumption of the consideration. This is a rebuttable presumption, but it requires not bare assertion but evidence. There is no such evidence for rebuttal of the presumption or consideration. This aspect of the matter has also not been appreciated by the trial court. On the contrary, whatever is said in the reply to the show cause notice has been believed to be true by the trial court. This ought not to have been the procedure adopted by the trial court. Always there shall be

some reply when show cause notice is given under section 138 of the Negotiable Instruments Act, 1881. Defences are bound to be there and therefore, they must have been evaluated properly upon some evidence by the accused and thereafter only the allegations can be evaluated. Therefore, the impugned order passed by the trial court is liable to be quashed and set aside. The cheque of Rs. 47000/- is at a pivotal position in the impugned order as if the complainant has taken away Rs. 47000/-, but this is a mere defence. If the evidence was allowed to be taken, then it could have been brought on record that there is no substance in the defence at all. All the defences are nothing but afterthought. The Court below could not evaluate the reply without evidence and therefore also, the impugned order deserves to be quashed and set aside.

3. I have also heard the learned Additional Public Prosecutor who has submitted that the impugned order passed by the learned Judicial Magistrate, First Class, Rajpipla is nothing but misfortune of the original complainant. The order cannot be

sustained for a minute for the simple reason that the defence cannot be evaluated just from the reply of the show cause notice given by the accused under section 138 of the Negotiable Instruments Act, 1881. The evidence ought to have been taken and the defence ought to have been decided through glasses of depositions. Different colour has been given to the whole matter. The whole order is against facts and law and therefore, it may be quashed and set aside by this Court and the trial court may be directed to conduct the case as expeditiously as possible.

4. I have also heard the learned counsel for the respondent no. 2 accused who has submitted that there is no error, much less, an error apparent on the face of the record, in the impugned order passed by the trial court. It is submitted by the learned counsel for the respondent no. 2-accused that the original complainant has taken away Rs. 47000/- and the complainant has not given any evidence before the trial court that the amount of Rs. 60,580/- is due towards original complainant. No bills for the sale of the case have been produced before the trial

court. This aspect of the matter has been correctly appreciated by the trial court. Even otherwise also, Revision Application could have been filed by the present applicant before the Sessions Court. The learned advocate for respondent no.2 has also relied upon the judgments reported in 1992(1) SCC, 217; (2004) 7 SCC, 338; (1999) 3 SCW,1447; AIR 1980, SC, 2147; AIR 2000 SC, 754; 2006(6) JT 72 (SC) and the judgment delivered by this Court in Criminal Appeal No. 585 of 1990 dated 21st June, 2003.

From the aforesaid judgment, it is pointed out by the learned counsel for respondent no. 2 that the trial court has enough powers to evaluate the defence raised by respondent no.2 and the conclusion arrived at by the trial court is absolutely true and correct and in consonance with the facts of the case and therefore, the impugned order may not be interfered with in the revisional jurisdiction.

5. Having heard the learned counsel for the rival parties and looking to the facts and circumstances of the case, in my view, the order dated 20th September, 2003 below application exh.

13 in criminal case no. 842 of 2000 deserves to be quashed and set aside for the following facts and reasons:

(i)It appears from the facts of the case that the court below has evaluated the defence raised by the respondent no. 2 accused in his reply to the show cause notice under section 138 of the Negotiable Instruments Act, 1881, without taking any evidence and exonerated the accused.

(ii) The learned Judicial Magistrate, First Class, Rajpipla cannot give a clean chit to respondent no. 2-accused on the basis of the reply only. The reply is nothing but a counter-allegation against the original complainant. The reply ought to have been decided on the basis of the evidence. No evidence in this case, has been recorded. The reply has been analysed in so much detail that discharage

application has been allowed by the trial court. This is against the procedure prescribed under the Code of Criminal Procedure. There is a presumption under section 118 of the Negotiable Instruments Act for consideration. This is a rebuttal presumption. Reply cannot rebut the presumption. There ought to have been some evidence. The reply cannot be evaluated at this stage. This aspect of the matter has not been properly appreciated by the court below. There is a grave error committed by the trial court which leads to miscarriage of justice.

(iii) Looking to the facts of the present case, the matter is of the year 2001. I am not inclined to relegate the present applicant to the Sessions Court as alleged by the respondent no. 2-accused. This Court has enough and adequate power under its revisional jurisdiction. It is not necessary that the present applicant with the facts of the present case and looking

to the order against which revision was filed, should be relegated to the Court of Sessions. Prima facie, the order passed by the trial court is against law. The defences have been evaluated without taking any evidence, in so much detail that the discharge application filed by the accused has been allowed.

6. As a cumulative effect of all the aforesaid facts and reasons, the order dated 20th September, 2001 below application exh. 13 in Criminal case no.842 of 2000 passed by the learned Judicial Magistrate, First Class, Rajpipla is hereby quashed and set aside. The learned Magistrate is hereby directed to proceed with criminal case as expeditiously as possible so as to complete final adjudication on or before 31st March, 2007. Rule made absolute accordingly.

(D.N.Patel,J)

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